Supreme Court of Errors of Connecticut.

BOARDMAN'S APPEAL.

By an ante-nuptial contract between B. and L. in 1857, B. agreed that certain bank and other stocks, then conveyed by him to a trustee, should be held by the trustee for the sole use of L. during her life, and be subject to any disposition she might make of them by will or written appointment; the same to be in lieu of dower and of all distributory share of his personal property if she should survive him. *Held*, that the right to the income from the stocks did not, under the statute (General Statutes, tit. 13, sec. 20), vest in the husband on the marriage, but that it belonged to the wife as her sole and separate estate.

After the marriage in 1857 until his death in 1871, B. received the dividends upon the stocks, upon a power of attorney from the trustee, without objection from his wife, rendering no account to her and keeping none, she not notifying him in any way that she should claim them as her own. It was found however that she had never in fact intended to relinquish her right to them, and did not suppose she had done so; that she supposed he was investing them for her benefit, a belief which was strengthened by occasional expressions of his; and that from motives of delicacy she did not inquire of him, he being uncommunicative on all business matters. It also appeared that the dividends were not needed or used for family support, B.'s income from other property being far in excess of the family expenditures. *Held*, that she was entitled to recover their whole amount from his estate, with interest.

A large amount of the dividends so received by B. had been from time to time invested by him in the name of the trustee in additional stocks of the same description. In 1870 B. procured a power of attorney from the trustee and transferred to himself all the stocks so acquired, intending to convert them to his own use. His wife had no knowledge of the transaction, and did not in fact know until after B.'s death that the dividends from the original trust stocks had been invested in such additional trust stocks. *Held*, that her rights were not affected by the transaction.

B., soon after this transaction and in pursuance of a general purpose, made a new will, in which he referred to the ante-nuptial contract and confirmed it, and gave to his widow his mansion-house and $200,000 for her life; stating his object to be to make abundant provision for her support and comfort, in lieu of dower and of all share in his real and personal estate. It appeared from evidence outside of the will that B. did not expect his widow to make a claim upon his estate for the dividends he had received, and that he made the foregoing provision for her in his will in that belief; also that the provisions of the will in her favor had been made known to her and that she had expressed herself fully satisfied with them. *Held*, that it was of questionable propriety to go outside of the will for evidence of the purpose and understanding of the testator; but that the will, taken by itself, or in connection with the facts stated, did not make the acceptance of its provisions by the widow a bar of her right to present a claim against the estate for an indebtedness.

And *held*, that her right to any portion of the sums received by B. as dividends was not barred by the Statute of Limitations.

THIS was a claim of Mrs. Boardman against the estate of her

deceased husband, growing out of an ante-nuptial contract entered into by them, a few days before their intermarriage.

The parties were married on the 28th of July 1857. He was then sixty-four, and she thirty-eight years of age. He had an estate of nearly or quite half a million of dollars, and she a patrimony of about six thousand dollars. He died on the 27th of August 1871, and his will bears date on the 19th of March 1870. The inventory of his estate is $1,110,190.05.

By the ante-nuptial contract above referred to Mr. Boardman conveyed to a trustee some shares of stock, to be held in trust, "for the sole use and benefit of said Lucy [afterwards Mrs. Boardman] during her life; and after her decease, to be subject to such disposition as the said Lucy, by will, or by any proper appointment in writing, may direct." The agreement then proceeds as follow: "It is further agreed and settled that the property and estate now appertaining and belonging to the said Lucy shall be and remain hers, to her own sole and separate use and disposition, to all intents and purposes. It is also further understood and agreed, in consideration of the premises, that in the event of the demise of the said William, leaving the said Lucy surviving, she will not claim or receive any dower in the real estate of the said William, wherever situated, nor any distributory share in his personal property, except as the same may be devised or bequeathed to her in the last will and testament of the said William; the provision in this marriage settlement being intended and accepted in lieu and in full of dower, and of widow's statutory rights, in both the real and personal property of the said William W. Boardman."

The dividends on these shares of stock, accruing after the date of this contract, were received by Mr. Boardman up to the time of his death, when they amounted, with interest, to between eighty and ninety thousand dollars. Whether or not his estate should be held liable to pay these dividends to Mrs. Boardman, was the question to be decided.

The opinion of the court was delivered by

FOSTER, J.—The case has been very ably, indeed exhaustively, argued. If the first claim on the part of the appellant be well founded, the question is shortly disposed of. That claim is, that the right to the income from these stocks being in Mrs. Boardman at the time of the marriage, that right thereupon became vested in her husband, during his life, by force of the statute; that his right

to these dividends was absolute and no valid claim for them can exist against his estate.

We must dissent altogether from this proposition. The language of this contract is clear and explicit. Its object and intent are too apparent to be mistaken; and the committee finds that it was executed, "as and for a valid and binding agreement upon the parties, for the uses and purposes therein mentioned." Out of Mr. Boardman's very ample estate he carved this comparatively small portion, and conveyed it to a trustee to be held for the sole use and benefit of her who was to become his wife, during her life; giving her the power of disposing of the same by will, or by any proper appointment in writing. This was received and accepted in lieu of dower, and in full discharge of all claims to any distributory share in his estate, should she survive him: which in the ordinary course of nature, was certainly to be expected.

We can have no doubt but that the income of this property belonged to Mrs. Boardman as her sole and separate estate. Such is the reading of the contract, which does not require, and scarcely admits of construction: Bell on the Law of Property of Husband and Wife 473, 475. The situation of the parties and the subject-matter of the transaction may very properly be brought into view to aid in determining the legal effect of a contract. Having abundant means, which were rapidly increasing, Mr. Boardman was no doubt desirous of making adequate provision for his wife in the event of his death, and at the same time of leaving his estate unencumbered by any claims for dower. So he was induced to make this settlement. Mrs. Boardman, in accepting it, even with its probable accumulations, was manifestly giving up a large portion of what the law, in the event of his death, she surviving, would pronounce hers. In the case of *Deming* v. *Williams*, 26 Conn. 226, this court recognised a distinction between a gift or a conveyance to a wife by a stranger and by a husband. Words of exclusiveness are necessary in the case of a stranger; otherwise, the unity of husband and wife would carry to the husband alone a gift of personal property made to the wife; but when the husband himself makes the conveyance, the wife takes a sole and separate estate without express words to that effect. As the parties contemplated immediate marriage, this settlement should be construed in light of this principle. The case of *Massey* v. *Rowen*, Law Reps. 4 Eng. & Irish Ap. Cas. 288, one of the most recent cases, per

haps the most recent decided in the House of Lords, where the doctrine of separate estates was very fully investigated, holds that the word "sole" has not a fixed technical meaning in a will; but that it may have in a marriage settlement. The doctrine of this case strongly supports, as we think, the construction which gives Mrs. Boardman a separate estate under this contract. To claim that, by virtue of his rights as her husband, Mr. Boardman was entitled to the dividends on these stocks, is to do violence to the language of this contract, and to defeat the very object which the parties designed to accomplish. We hold that these dividends were the sole and separate property of Mrs. Boardman, and being hers by an ante-nuptial contract, they continued hers after marriage, precisely as if she had remained a feme sole: *Imlay* v. *Huntington*, 20 Conn. 146; *West* v. *Howard*, Id. 587. To hold, as we must, that by the terms of this settlement this widow is barred of her dower in this large estate, and then not permit her to call her own the income of the fund expressly secured to her and accepted by her in substitution, would be, indeed, the grossest injustice. As Lord HARDWICKE pithily asked in *Tyrrell* v. *Hope*, 2 Atk. 558, we would ask here, "to what end should she receive it, if it is the property of her husband the next moment?"

The record shows that, from time to time, after the marriage, Mr. Boardman procured orders from the trustee of this property, who was his sister, and collected the dividends declared, as they fell due, through his bankers in New York, who placed them to his credit, with other funds of his on deposit with them. That Mr. Boardman was accountable for these dividends during his life, and that his estate became chargeable after his death, payment over not having been previously made, is a necessary result of what we have already said, and must, indeed, be considered as settled on well established principles: *Walker* v. *Walker*, 9 Wallace 743.

It is insisted however, on the part of the appellant, that there are various most satisfactory reasons why this claim against the estate of Mr. Boardman cannot be maintained, even if the original right to these dividends, under this marriage settlement, be conceded to Mrs. Boardman.

Mr. Boardman was permitted to receive these dividends during his life, with Mrs. Boardman's knowledge, and without objection or interference from her. He received and used them as his own,

keeping no account with his wife in respect to them, and rendering her no account of them; and though she was aware that he was so taking and using them, she never called upon him, or the trustee, for any account of them, or expressed any dissatisfaction with the course that was being pursued, or gave any notice of an intention to claim them as her own. We are referred to divers highly respectable authorities, elementary writers and decided cases, by the appellant's counsel, to show that under such circumstances the law implies her assent, and that at his death this income belonged to his estate.

We deem it unnecessary to go into any examination of these authorities, for the reason that other facts, found by the committee, exert a paramount influence, and render the principles contended for inapplicable to the case before us.

The committee finds that Mrs. Boardman supposed and believed that this income belonged to her; that she had a general impression from the tenor of the contract that these dividends were to be invested and accumulate for her benefit and form an estate for her after her husband's death; that she never intended to relinquish her legal rights under the ante-nuptial contract, and never supposed that she had done so; that she never in fact relinquished any of them, unless such relinquishment may be legally inferred and implied from other facts found, and from her acceptance of the provision made for her in his will.

The committee further finds that Mrs. Boardman was not much acquainted with business affairs, and had perfect faith in the good judgment and great caution of her husband; that he was not in the habit of talking with her in relation to his business transactions or investments; and that she, from motives of delicacy, never questioned him in relation to matters which he seemed to prefer not to make a subject of conversation. On some occasions Mr. Boardman sent orders by his wife for the trustee to sign, saying "they are orders for your dividends." Some three or four years after the marriage, Mr. Boardman had a negotiation with a gentleman in New Haven for the purchase of a block of buildings in that city. He informed his wife that he was about to make such a purchase with some of her dividends. She asked where, and he informed her. Soon after he told her that the owner refused to sell. About the same time, in speaking of the Southern States, and the probability of their repudiating their bonds, he said to

her, "Now you will be glad you have none of those Mobile bonds." It is found that Mrs. Boardman understood these remarks, in reference to her dividends and investments, as implying that he was, in some way, investing them for her benefit.

On the shares of stock in the Delaware & Hudson Canal Company, stock dividends were made at three several times, amounting in the aggregate to one hundred and ninety-nine shares. Fifteen additional shares were also distributed on the stock held in the Bank of New York. The trustee received the certificates for these additional shares with the knowledge of Mr. Boardman. One hundred and thirty-three shares in the Delaware & Hudson stock were subject to a payment of sixty dollars per share, which was made by the bankers of Mr. Boardman, by his direction, out of funds in their hands. One hundred dollars per share was in like manner paid, and in the same way, on the fifteen shares of additional stock in the Bank of New York; the dividends previously received by Mr. Boardman, from the trust funds, in each of those institutions, being greater than the amounts so paid. In August 1860, Mr. Boardman purchased, through his bankers, for and on account of said trust, fifty shares of stock in the Continental Bank in the city of New York. These shares were transferred to the trustee by his bankers August 27th 1860. The dividends on said trust stocks exceeded at that time the amount of the purchase. It is expressly found that this investment was made in consequence and on account of the dividends received from said trust stocks, and as a partial investment thereof, for the use and benefit of his wife. All these shares stood in the name of the trustee, down to the 14th of February 1870, when Mr. Boardman procured some of them to be transferred to himself by virtue of powers of attorney previously procured from the trustee.

In face of these facts it surely cannot be said that Mrs. Boardman, knowingly and intentionally, gave up her right to these dividends. There was no relinquishment, no abandonment. She was aware that her husband collected them and disposed of them, and she assented to it. There are numerous cases, and of the highest authority, in which it has been held that when the wife permits her husband to receive the profits of her separate estate, they living together, and he paying all the expenses of their domestic establishment, the presumption of law is, that it was the intention of the wife to make a gift of those profits to her husband. There are many cases where in consequence of these receipts of the income

of the wife's separate estate, the husband is induced to live at greater expense than he otherwise would have done; thus increasing the comforts of their home, perhaps procuring luxuries for his wife as well as for himself. To call the husband to account, after a lapse of years, for moneys thus expended, or to make a claim on his estate, after his death, in favor of the wife, would obviously be unjust. The case at bar differs widely from all such cases. Mrs. Boardman assented to the collection of the dividends on her separate estate by her husband, and to the disposition of them by him.

Was her assent given to an expenditure of these dividends for her support, or for that of the family? On the contrary, it is expressly found that she supposed he was investing them for her benefit. His own declarations to her, with other facts found by the committee, clearly warranted her in entertaining such a supposition at the time; and from proofs now made, the fact is established beyond doubt or controversy, that this trust fund was increased by these dividends from time to time after the marriage, till the year before the death of Mr. Boardman. She never called for an account of these investments, and made no inquiry regarding them, during her whole married life. The reason is given by the committee. We think it creditable to them both. Living harmoniously and happily together, they found other topics of conversation more interesting than a discussion as to how they had bestowed, or how they should bestow, their increase of goods. The just demands of Mrs. Boardman are not to be impaired by her having been silent rather than clamorous; a course of conduct which, under the circumstances, we must regard as eminently praiseworthy. Nor were Mr. Boardman's expenses affected in the slightest degree by the receipt of these dividends. His annual expenditures absorbed but a small part of his individual income.

The right of Mrs. Boardman to these dividends during her married life, as her sole and separate estate, being established, we discover, as yet, no reason why her claim against the estate is not just and valid. The liability for interest perhaps necessarily follows; it certainly does in this case, for interest was received. A few additional questions, bearing upon the main fact, remain however to be considered.

On the 31st of January 1870, Mr. Boardman procured from the trustee powers of attorney to convey one hundred and ninety-nine shares of stock in the Delaware & Hudson Canal Company,

the accumulation on the original two hundred shares; fifteen shares of stock in the Bank of New York, additional to the original hundred and twenty shares; and fifty shares of stock in the Continental Bank, previously purchased on account of the dividends received from said trust stocks, and as a partial investment of the same for the use and benefit of his wife. On the 14th of February 1870, acting under these powers of attorney, Mr. Boardman caused these shares of stock in the Delaware & Hudson Canal Company and in the Continental Bank, to be transferred to himself; and on the 11th day of April 1870, he caused the shares in the Bank of New York to be transferred to himself by virtue of the same power. And it is found that, at the time he applied for and obtained said powers of attorney, and transferred said stocks, he intended thereby to convert the same to his own use, so that neither said stocks, nor the dividends received by him upon said original trust stocks, should go to the use and benefit of his wife, but should belong to and form part of his estate. Of all these transactions, indeed of the existence of these stocks, as accumulations of, or as belonging to, the trust funds, Mrs. Boardman was wholly ignorant until after his death.

We cannot regard these acts of Mr. Boardman as materially affecting the rights of Mrs. Boardman. At the most, they amount to no more than an assertion of his rights, as he understood them, to those trust funds and accumulated dividends; his construction of the ante-nuptial contract. It should be borne in mind that during all his previous married life, then approaching thirteen years, he had given this contract a totally different interpretation; had recognised and treated these dividends as she had, as hers, not as his. This late, sudden and unexplained change of views, wrought out in secret, so far as she was concerned, cannot and should not increase any right of his or diminish any right of hers.

But the will of Mr. Boardman, made in connection with these transactions, on the 19th of March 1870, makes provision for Mrs. Boardman, which, it is insisted, she cannot accept, as she has done, and also be entitled to the allowance of this claim.

In the first item of this will the testator says:—"The settlement I made with my dear wife, Lucy H. Boardman, before our intermarriage, in lieu of dower, is hereby confirmed; and in addition to the provision therein made for her, I hereby give and devise to her the mansion-house, grounds," &c., &c. Then follow other bequests;

then this clause:—"My intention and object was and is, to make abundant provision for the support and comfort of my dear wife, by the three preceding items, in lieu of dower, or share in my real or personal estate." He then disposes of the residue of his estate, making no other or further allusion to his wife.

While it is quite plain that by accepting the provision made for her in this will the widow is cut off from dower, we discover nothing in the entire document which bars her from presenting and enforcing any legitimate claim, by way of indebtedness, which she may have against the estate. Besides, the will confirms this marriage settlement, and directs all just claims and expenses to be paid. So far, therefore, from finding any impediment to the payment of this claim within the will itself, we should say, looking to that instrument alone, that the testator directed that it should be paid.

Highly respectable authorities, certainly, are not wanting to show that we are not at liberty to go outside of what is technically styled the four corners of a will, in a case of this description, to get at the intention of the testator. That may be the safer and better rule, but, as we reach the same result in either event, we prefer not to put the case solely on that ground.

Going outside of this will, it appears that the testator did not suppose that this claim would be made against his estate; that the clauses in it relating to his widow were placed there in the belief that it would not be made. Perhaps it is no assumption under these circumstances to say that the testator then regarded the claim as invalid; that if presented it would not be allowed. Had he known that the law would have pronounced the claim good, and that his estate was responsible for it, can any one say that he would not have said to his executors, pay it? But then he would have altered his will. That is possible, but what would the alteration have been? Is any one warranted in saying that he would have made no bequest whatever to his wife? If any, how much? Taking out this claim, his estate had more than doubled during his married life. On reflection, is it certain that he would have diminished the amount given to his wife?

But it is idle to wander in this field of conjecture. That the will gives the widow the original trust fund, and certain specified amounts in addition, is agreed. Let the provisions of the will be carried out, and let this claim stand on its own merits.

But it is said that the provisions of this will, in favor of Mrs.

Boardman, were made known to her, and that she expressed herself fully satisfied with them. We see nothing in that to bar this claim. She was not asked to relinquish it, and did not suppose that she had relinquished it. Nor do we think that the doctrine of election applies in this case. The amount received by the residuary legatees will, no doubt, be diminished by the payment of this claim; but we do not think that the assertion of it violates the familiar principle which forbids one, after taking a beneficial interest under a will, from setting up a right or claim which shall defeat the effect and operation of that will.

The Statute of Limitations presents no bar. As against the trustee no right of action has accrued. Mr. Boardman held this money by power of attorney from the trustee, and was in the place of the trustee. He exerted no power as husband, nor as such did he attempt to exert any, prior to 1870; when, and not before, if her rights were not saved by coverture, the statute began to run.

We advise the Superior Court to make the corrections in the items of this account suggested in the report of the committee; and then to affirm the decree of the Court of Probate.

The foregoing opinion presents some practical questions in regard to the separate property of the wife, under marriage settlements, and agreements on the part of the husband to keep property exclusively for her use, which have not yet ceased to be of interest to the profession. In the present case, where the husband's estate was so large as not, in any sense, to require to use the income of the wife's separate property in the current expenses of the family, it seems very proper to hold his estate accountable for all such income, and the interest upon it, although received many years before his decease, and not set apart, in any such way, as to indicate the purpose of securing it for the separate use of the wife. But in any case, where the income of the wife's separate property was reasonably needful for the support of the family and had been paid to the husband and expended by him for that purpose, without objection on the part of the wife, which must be regarded as amounting to acquiescence in such use, on her part, it would seem very unreasonable and unjust to demand the same rule of accountability on his part. It may be said, that the rule of responsibility on the part of the husband, for the income of the wife's separate estate, must be the same in all cases. That may be true, as a rule of law. He is, perhaps, presumptively accountable for all which comes to his hands, and is to be held accountable to the same extent as any other agent. But this accountability, as the agent of the wife, in the receipt of the money, may be answered by showing that the agency also existed in regard to the expenditure of the same. And it would be very unsatisfactory to hold, that while the family were maintained and the wife supplied with necessary paraphernalia and pin-money by the husband, he was all the time to be held responsible for the same money which she had thus expended, when his means were so narrow that he could not have supported his wife and family in

the way he did without the use of the income of her separate estate, and that this was known to his wife at the time. We need not refer to the cases upon this point, since they are of almost infinite variety, no two being alike precisely, and some of them seeming to be decided rather upon the principle of affording a support for the wife and family in the future, by placing a burden upon the husband's estate, which he never expected to bear, and which in justice to his creditors his estate ought never to bear. If the present case involved any such principle we should desire to state the reasons of our dissent more at length. But as no such question here arises, we shall content ourselves by protesting against its receiving any such application.

I. F. R.

Supreme Court of Montana.

THE TERRITORY OF MONTANA, PLAINTIFF AND RESPONDENT, *v.* 3000 FEET OF MINING GROUND, AND FOUK LEE, DEFENDANT AND APPELLANT.

The territories, even after being organized by Congress, possess none of the attributes of sovereignty. They cannot, therefore, enact laws for the forfeiture of lands of aliens.

The nature and extent of territorial governments discussed, their powers defined and explained.

THIS was an action brought under an act of the territorial legislature, entitled "An Act to provide for the forfeiture to the territory of placer mines held by aliens," Codified Statutes p. 593. The act substantially provides that no alien shall be allowed to acquire any title, interest or possessory or other right to any placer mine or claim, or to the profits or proceeds thereof in this territory, and that whenever it shall be made to appear to any district attorney, that any alien is in possession, occupation, use or enjoyment of any placer mine or claim within the district of such district attorney, or that any alien claims any right, title or interest in or to any such mine or claim, by pre-emption, location, acquisition, or by gift, grant, bargain, sale, conveyance, transfer, assignment, lease or mortgage, it shall be the special duty of such district attorney forthwith, to institute in the District Court of the proper county, an action in the name of the territory, against such placer mine or claim for the forfeiture thereof to the territory. And the act further provides, that if upon the trial it shall be made to appear that the mine or claim in question is occupied, possessed or claimed by an alien, or that any right or interest therein, has